Culley Mechanical and Instrumentation Co., Inc. *and* United Association of Journeymen and Apprentices in the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 10, AFL–CIO. Cases 5–CA–23138 and 5–CA–23501

January 20, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On January 14, 1994, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and an answering brief to the Respondent's exceptions. The Charging Party also filed cross-exceptions and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, except as modified below, and to adopt the recommended Order as modified.

We agree with the judge's finding that the Respondent violated Section 8(a)(3) of the Act by discharging employees James Jordan and Billy Wilson 5 days prior to the expiration of its 8(f) agreement with the Union because of their union affiliation.[1] We disagree, however, with his finding that the Respondent did not violate Section 8(a)(1) when it announced to these employees, contemporaneously with discharging them, its intention to go nonunion at the end of the contract term. We also find, contrary to the judge, that the Respondent violated 8(a)(1) by calling the two discriminatees at home and asking them to drop the unfair labor practice charges.[2]

1. With regard to the Respondent's announcement that it intended to become a nonunion employer, the judge based his conclusion that such a statement did not violate Section 8(a)(1) on the reasoning of *Yellowstone Plumbing*, 286 NLRB 993 (1986). In that case, the respondent employer informed the employees 4 months prior to the expiration of the 8(f) agreement that it intended to terminate all its agreements with the union and that it no longer considered itself represented by any multiemployer group or association for the purposes of collective bargaining. Following the contract's expiration, the respondent withdrew recognition from the union. The Board found no violation of Section 8(a)(5) in the respondent's withdrawal of recognition, because, under *John Deklewa & Sons*,[3] the union enjoyed no presumption of majority status on expiration of the agreement. The Board went on to hold that the employer ''was free to tell employees that after [the contract expired] the shop would be nonunion.''

We find this case to be distinguishable from *Yellowstone Plumbing*. The Board's holding there was based on the finding that the employer could lawfully withdraw recognition of the union at contract expiration. In this case, however, the unfair labor practice issue does not turn on whether the Respondent was in a position legally to withdraw recognition from the Union when the 8(f) contract expired. The Respondent's president announced that he could no longer afford ''to remain Union'' in the course of unlawfully discharging employees Jordan and Wilson because of their union affiliation. Under these circumstances, the employees would reasonably interpret the reference to nonunion status as a threat that the Respondent would no longer employ individuals who supported or belonged to the Union, rather than as an arguably lawful statement about its obligation to bargain with the Union after the 8(f) contract expired.[4] We find that such a threat violated Section 8(a)(1) of the Act.[5]

2. Contrary to the judge, we find that the Respondent violated Section 8(a)(1) when the Respondent's president, Mark Culley, telephoned discriminatees James Jordan and Billy Wilson in January 1993 and requested that they drop the unfair labor practice charges against the Respondent, because, as Jordan tes-

[1] No exceptions were taken to the judge's finding that the Respondent did not repudiate the September 1, 1989–August 31, 1992 contract, withdraw recognition from the Union, or cease to abide by the terms of that agreement prior to its expiration, and consequently, that it did not violate Sec. 8(a)(5) of the Act, as alleged in the consolidated complaints. Nor were exceptions filed to the judge's finding that the Respondent's layoffs of James and David Culley did not violate Sec. 8(a)(3) of the Act.

[2] We find it unnecessary to rely on the following findings of the judge to which the General Counsel has excepted: that the Union breached the contract by striking; that the Respondent did not give the Union notification of a desire to terminate the contract in accordance with its terms; and that the contract must have been subject to termination at some time.

[3] 282 NLRB 1375 (1987).

[4] We find no need to pass on whether the Respondent has any postexpiration duty to bargain with the Union.

[5] Member Stephens would not find that Respondent violated Sec. 8(a)(1) by telling its employees that it intended to go nonunion. In his view, because the question of a postexpiration duty to bargain was specifically not alleged and litigated in this case, the Board cannot find that it is unlawful for the Respondent to tell employees that it planned to have no further relationship with the Union after the 8(f) contract expired. Thus, there can be no finding of an 8(a)(1) violation absent an affirmative showing that there was a continuing obligation to bargain after the agreement expired. In his view, no such showing has been established here. He also disagrees with his colleagues that this lawful statement became unlawful because Respondent unlawfully discharged two employees. The General Counsel did not allege the violation on that basis nor was that theory litigated.

tified, ''[the Respondent] was having financial problems and could not afford to pay any remedies.''

The judge found no 8(a)(1) violation because Culley did not inquire into the union activities, sympathies, or sentiments of the former employees, but simply asked them to do him a favor because of his financial distress. The judge concluded that this did not amount to an ''interrogation'' and ''would not seem reasonably to have had a coercive effect upon Wilson and Jordan, particularly since they were no longer actively employed by Respondent.''[6] We disagree.

When Culley told Wilson and Jordan he was laying them off, he also told them that he would rehire them at union scale but without contractual benefits if they could not get work through the union hall. While he did not subsequently offer them employment, he never withdrew that offer. Thus, although Wilson and Jordan were not ''actively employed by the Respondent'' when Culley called them, they had a continuing link to future jobs with the Respondent by virtue of Culley's earlier offer of possible employment if they were willing to forgo contractual benefits.[7] That link was strengthened by their status as alleged discriminatees under the Union's charges then pending in Case 5–CA–23138. At the time they received Culley's calls, therefore, they had standing analogous to applicants for employment with the Respondent; and it is in their status as potential employees of the Respondent that Culley's request must be considered. In that regard, when Culley called, Wilson and Jordan were already aware of the Respondent's desire to be nonunion, because Culley had made that clear to them before, and at the time, they were laid off. Consequently, Culley's request that they withdraw their charges carried with it certain unspoken but implied conditions: that in forgoing their right to any redress they might obtain under the Act, they accede to any discrimination that might have been practiced against them and accept not only past but future limitations on the exercise of their Section 7 rights as employees of the Respondent. Also implicit in the request—given what they experienced in being laid off by the Respondent—was the message that any conduct inconsistent with the Respondent's desire to operate nonunion could jeopardize their chance at employment. In these circumstances, the request was inherently coercive.[8]

[6] Judge's decision at sec. II,B,2.

[7] That the Respondent did not call the two employees after their layoffs to see if they would return to work on the basis of this offer is insufficient to show that the offer had been withdrawn. Nor is it material that the two employees testified that they would not accept employment in a nonunion setting. There is no evidence that they expressed these feelings to Culley when the offer was made to them or at any time thereafter. Moreover, such views are not necessarily immutable; the employees could always change their minds. In any event, it is the offer itself that establishes the link to the possibility of reemployment.

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusions of Law 4 and 5 and renumber the remaining paragraphs.

''4. By telling employees that it intended to become a nonunion employer, the Respondent violated Section 8(a)(1) of the Act.

''5. By asking employees to drop unfair labor practice charges filed against it, the Respondent violated Section 8(a)(1) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Culley Mechanical and Instrumentation Co., Inc., Ashland, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(b) and (c) and reletter the remaining paragraph.

''(b) Threatening employees by telling them that the Respondent intends to become a nonunion employer.

''(c) Coercing employees by asking them to drop unfair labor practice charges filed against it.''

2. Substitute the attached notice for that of the administrative law judge.

[8] The Board has long held that questions about union activities or sympathies, in the context of a job interview, are inherently coercive, without accompanying threats, even where the employee is subsequently hired. *Rochester Cadet Cleaners*, 205 NLRB 773 (1973). The same holding applies in situations where the employee is not hired. *Lucy Ellen Candy*, 204 NLRB 121, 123 (1973). Here, Culley's request placed Wilson and Jordan in a situation similar to that faced by applicants who were told that the employer intended to operate nonunion. In *Eddyleon Chocolate Co*., 301 NLRB 887 (1991) (applicant asked to pledge that she would not join a union), and *Williams Enterprises*, 301 NLRB 167 (1991) (statement made by a successor employer to prospective employees), the Board found that such conduct tended to interfere with the employees' Sec. 7 rights and was therefore in violation of Sec. 8(a)(1) of the Act.

We find it unnecessary to determine whether the Respondent's request to withdraw charges constituted an ''interrogation'' as that term is used in labor law parlance. As noted, our 8(a)(1) finding is based on the coercive effect of the Respondent's conduct on the employees' right to pursue unfair labor practice charges aimed at securing Sec. 7 rights.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, lay off, or otherwise discriminate against any employees and thereby discourage membership in United Association of Journeymen and Apprentices in the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 10, AFL–CIO (the Union), or any other labor organization.

WE WILL NOT threaten employees by telling them that we intend to become a nonunion employer.

WE WILL NOT coerce employees by asking them to drop unfair labor practice charges filed against us.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid, or to refrain from any and all such activities.

WE WILL offer, if we have not done so, James Jordan and Billy Wilson reinstatement to their former jobs and WE WILL compensate them with interest for any loss of pay they may have suffered as a result of their terminations.

WE WILL remove from our files any references to the terminations of James Jordan and Billy Wilson and notify them in writing that this has been done and that their discharges will not be used against them in any way.

CULLEY MECHANICAL AND INSTRUMENTATION CO., INC.

Paula Sawyer, Esq., for the General Counsel.
David Simonsen, Esq., of Richmond, Virginia, for the Respondent.
R. Richard Hopp, Esq. (O'Donoghue & O'Donoghue), of Washington, D.C., for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was heard in Richmond, Virginia, on August 17, 1993.[1] The consolidated complaints allege that agents of the Respondent violated Section 8(a)(1) of the Act by certain conversations with its employees; violated Section 8(a)(3) by terminating the employment of four employees in August 1992; and violated Section 8(a)(5) by, on and after August 27, 1992, repudiating a collective-bargaining agreement then in effect, withdrawing recognition from the Union, and ceasing to abide by the terms of that collective-bargaining agreement. The answers filed by Respondent deny all of the operative portions of the complaints.[2]

Briefs were received from the General Counsel and the Charging Party, and a memorandum letter from the Respondent, on or about October 4, 1993. Having reviewed the briefs, the transcript of proceedings, the exhibits, and my recollection of the demeanor of the witnesses, I make the following findings of fact,[3] conclusions of law, and recommendations.

I. FACTUAL BACKGROUND

Respondent is a small Virginia corporation which engages in the business of providing plumbing and related services in the commercial construction industry from its location in Ashland, Virginia. Its president and vice president at material times were, respectively, brothers Mark and Brian Culley.

Since in or around 1979, Respondent, a member of the Mechanical Contractors Association of Virginia, which represents its members in collective-bargaining relationships with the Union, has been a signatory[4] to the successive bargaining agreements which have been negotiated, in a multiemployer bargaining unit, by the Association and the Union. The parties agree that the multiemployer relationship was formed under, and continued under, Section 8(f) of the Act.[5] The bargaining agreement immediately material hereto was in effect from September 1, 1989, through August 31, 1992.[6]

In the period August–October, Respondent had only one project in progress: the replacement of the secondary hot water piping for the Rotunda at the University of Virginia in Charlottesville. The job had begun in February 1992 and, according to a document in evidence, was to have been substantially completed by September 15 and finally completed by September 30. In the summer of 1992, Respondent had four mechanics working on the job—alleged discriminatees David Culley (a cousin of Mark and Brian), James Culley (an uncle), James Jordan, and Billy Wilson—and two help-

[1] The charge in Case 5–CA–23138 was filed on November 16, 1992, and was amended on February 25, 1993. A complaint in Case 5–CA–23138 was also issued on February 25, and was amended at the hearing on August 17. The charge in Case 5–CA–23501 was filed on April 27, 1993, and a complaint issued therein on July 27, 1993, which was consolidated with Case 5–CA–23138 on the same date.

[2] There is, however, no dispute that Respondent is engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, or that the Union is a labor organization as contemplated by Sec. 2(5) of the Act.

[3] For purposes of clarity, certain changes in the transcript have been made.

[4] In fact, the two contracts in evidence do not show that anyone signed them on behalf of Respondent. However, the testimony and the statements by counsel for Respondent leave no doubt that Respondent understood that it was bound to such agreements, at least at certain times.

[5] That section authorizes an employer engaged in the construction industry to enter into a bargaining agreement with a construction industry union even in the absence of establishment of the union's majority status in accordance with Sec. 9 of the Act.

[6] All dates hereafter refer to the year 1992, except as otherwise indicated.

ers. Respondent's testimony is not contradicted that the helpers (not alleged to be discriminatees) asked for and received layoffs in mid-August. Although the record is not entirely clear as to the timing, on August 26, Respondent laid off Jordan and Wilson, and, on August 27, laid off David and James Culley. There is no express evidence to controvert the testimony of Mark Culley that David and James Culley, neither of whom testified, asked to be voluntarily laid off because they knew Respondent's ''financial status'' and they ''had something else lined up.'' However, the ''Notice Of Termination'' personnel file documents for David and James Culley, signed by Brian Culley, have marked as the ''Reason For Termination'' the spaces next to ''Reduction in Force'' under the heading ''Layoff''; also available on the forms, but unmarked, is a column called ''Voluntary Quit,'' with such subheadings as ''To Accept Other Work.'' Unfortunately, Brian Culley was not questioned about these forms at the hearing.

Negotiations for a new bargaining agreement between the Association and the Union began around April. Mark Culley participated in at least two of the negotiating sessions and then went to Charlottesville to work on the University project. Although the existing contract formally expired on August 31, a new 3-year agreement with the Association was not consummated until December (but was made effective as of September 1). Prior to August 28, Mark Culley had told Respondent's employees that he was ''going to go non-union rather than go bankrupt.'' On that date, Culley, himself a union member, went to the union hall and told the business manager that he was resigning (''turning my book in''), explaining that his motivation was ''all financial.'' Nonetheless, in February 1993, Respondent became a signatory to the 1992–1995 contract, which, as indicated, had been made effective as of September 1, 1992.

Mark Culley testified that he told Jordan and Wilson on August 26 that he was laying them off ''due to the asbestos problem.'' The record contains documentation that in late August, it was apparent that some delay was being and would be occasioned by the presence of asbestos in certain areas of the University job on which Respondent was working. Respondent is not equipped, certified, or bonded to remove asbestos, and the work had to be done by a qualified team employed by the University. An August 28 letter from Brian Culley to the engineering consulting firm which immediately supervised the project states that two problems were delaying the progress of the remainder of the project, one of them being the failure to remove the asbestos on ''piping north and south of Pavilion V.'' Mark Culley testified that because of the asbestos problem, he shut the job down on August 28.

Also on Culley's mind, however, was assertedly his belief that all of his employees would go on strike after the contract expired on August 31. His testimony on this subject was not unequivocal; at first he stated that ''all of my Union employees told me that they were going to strike,'' which was followed almost immediately by the less definitive statement that the employees had ''all said that there was talk'' about a strike, only to be replaced without pause by the answer, ''No'' to the question, ''Did any of the four of them indicate to you whether or not they would go out on strike if a strike was called?''

Nonetheless, Culley testified that when he laid off Wilson and Jordan, he told them that if they wanted to come to work for him during a strike, once the asbestos situation was cleared up, he would be glad to take them back at the current union scale of $16.85 but without benefits (worth about $3). Wilson and Jordan essentially confirmed that such an offer was made. Wilson said that Mark Culley told them that they could come back to Respondent to work for ''$16.85 an hour without the benefits'' if they ''couldn't find work at the hall''; he denied, however, that Culley mentioned asbestos in the conversation. Jordan testified that Culley said that ''he just couldn't afford to pay us the Union scale any more and remain Union,'' and was ''planning on dropping out of the Union.'' Jordan also stated that Culley offered him and Wilson their jobs back ''within a week or so'' if they could not find work through the union hall, but only at the hourly scale without benefits; Jordan did not reply. He testified that Culley made no mention of asbestos, which problem, Jordan testified, had by August 26 been reduced (in his opinion) to a matter of a single day's work for a qualified employee.

In fact, for what it is worth, I am convinced by the record as a whole that there was some delay caused by the asbestos problem. On September 2, Brian Culley wrote to the engineering consultants that, contrary to assurances given him on the preceding day, asbestos still remained in the unfinished areas, and ''This issue needs to be resolved before work can be resumed.'' On that same day, an agreement was reached between Respondent and the University that Respondent would have six or seven employees on the site on September 8 to resume work.

The record shows that on September 2 and 6, Respondent placed advertisements in a Richmond newspaper for plumbers with a minimum of 3 years' experience in commercial work. Four plumbers were hired at rates ranging from $10 to $15 an hour, and two laborers were also hired. The evidence discloses that the first two plumbers were hired on September 8, the third on September 9, and the fourth on September 14. Respondent resumed work at the project on about September 9, presumably after the last of the asbestos had been cleaned away.

Wilson and Jordan testified that in February 1993, Mark Culley called them at home and asked if they would drop the charge that had been filed in September. Jordan testified that Culley told him that he was having financial problems and could not afford to pay any remedies. Both former employees in effect told Culley that the decision to withdraw charges was up to the Union, which was the Charging Party.

II. DISCUSSION AND CONCLUSIONS

A. *The 8(a)(3) Allegations*

Respondent's failure to file a brief hampers analysis to some extent, but counsel for Respondent did make an oral argument at the hearing which focused on certain issues.[7]

As for the 8(a)(3) allegations, Mark Culley did not deny the testimony of Billy Wilson, who seemed quite credible, that Culley told him in early August that he was having fi-

[7] The posthearing letter filed by Respondent reiterated one portion of the oral argument. In the letter, counsel also represented that Respondent was not filing a brief because it could not afford to purchase a copy of the transcript.

nancial difficulties. When Wilson asked if Culley was ''going non-union,'' Culley said that ''the way things were going that he was'' and that he ''was going to lay us off if he would go non-union.'' Jordan, also an impressive and uncontroverted witness, testified (although Wilson did not) that when Culley told him and Wilson on August 26 that they were being laid off, Culley said that ''he just couldn't afford to pay us the union scale any more and remain union. He was planning on dropping out of the union.'' Mark Culley conceded that prior to August 28, he had probably told all the employees that ''if staying in business meant going non-union, then I would as soon stay in business.'' As described above, Wilson and Jordan also testified that Culley told the two that if they could not find work through the union hall, he would give them back their jobs within a week or so, but would only pay union scale without contractual benefits.

At the hearing, counsel for Respondent contended that there had been no antiunion animus shown for the late August layoffs. He argued that ''there was, in fact, a problem with asbestos where the contractor needed to stop work at some point.'' There was and had been, undoubtedly, an asbestos problem. However, as of August 26, when Respondent laid off Wilson and Jordan, the documents of record give no indication that Respondent had any reason to believe that the problem would necessitate a layoff on August 26. A University Inspector's Report for Friday, August 28, shows that there was plumbing work capable of being done despite the fact that the asbestos problem had not ''been resolved''; indeed, the report states that Mark Culley had announced that a ''new crew will be on site Monday 8/30/92 [sic].''[8]

It seems perfectly clear that when Mark Culley turned in his union card to Local 10 Business Manager Stuart Waters on August 28, saying that he ''just could not afford the Union anymore,'' (''[i]t was just between him and going out of business''), he was stating his intention to dissolve his relationship with the Union, presumably as of August 31, when the multiemployer bargaining agreement expired. Since, as counsel for the General Counsel assured us at the hearing, the Government is only claiming that the collective-bargaining relationship was validated by virtue of Section 8(f) of the Act, this may or may not have been within Respondent's rights, *John Deklewa & Sons*, 282 NLRB 1375 (1987), as discussed infra. However, it is also clear that the terminations of Wilson and Jordan were unlawful if they were governed by union considerations, and that is what the evidence indicates here.

As noted, Wilson testified credibly that Culley had told him that if Respondent left the Union, it would also let go its regular employees, all known by Respondent to be union members. It does not matter whether Respondent hewed to its threat (1) because it was fearful that retaining union members in its workforce could lead to reorganization of the Company; or (2) because it believed that the Union employees would not accept fewer benefits than the union contract provided; or (3) that the employees would respond to a strike call.[9] By terminating employees for any such reason, Respondent would ''by discrimination . . . discourage membership in a labor organization.'' *Radio Officers v. NLRB*, 347 U.S. 17 (1954); *Jack Welsh Co.*, 284 NLRB 378, 383 (1987).

Moreover, the very fact that Respondent laid off Wilson and Jordan and hired new employees is evidence that the union affiliation of the former was the causative factor in the layoff. Business Agent Waters testified that ''normally'' when a plumber contractor finds asbestos on a job, he will ask the crew to simply take a few days off without pay, both because a layoff would send them to the bottom of the hiring hall out-of-work list and because the employer would ''get a whole new set of employees when [he] hire[s] back,'' employees who would be unfamiliar with the project. Neither Mark nor Brian Culley directly addressed this testimony as to ''normal'' practice given by Waters, although Mark Culley testified that he would have laid off James and David Culley even if they had not asked for a layoff because ''I couldn't pay people for standing around.'' At the same time, however, Mark Culley also testified that he made the offer to Wilson and Jordan to return to work at lesser benefits because ''it would be a big advantage to me to have somebody who is familiar with the job.'' Despite that, the Culleys made no effort to inquire of the two employees if they would return to work on that basis after August 31.[10]

Finally, there is the rather fragile testimony of the Culley brothers that they decided on August 28 to shut down the job because of the asbestos problem (Mark testified that he ''believe[d]'' that the decision was made on August 28; Brian more positively testified that he and Mark jointly made the decision on August 28). But since the two plumbers were let go on August 26 or 27, it must have been for some reason other than a decision made on August 28.

Having considered the matter in accordance with the analysis required by *Wright Line*, 251 NLRB 1083 (1980), I am of the opinion that the terminations of Wilson and Jordan on August 26 violated Section 8(a)(3).[11]

A more difficult question is presented by the cases of James and David Culley. While Mark Culley was a presentable witness, his testimony, some of which has been highlighted above, leads me to believe that he is not a reliable one. Nonetheless, his testimony that James and David asked

[8] That there was work which could have been done as of August 26 is shown by the fact that, according to Wilson and Jordan, at the time they were laid off, they were actually engaged in working on the project.

It may be noted that Thursday, August 26, was the last day of the workweek of four 10-hour days, so that Culley's stated intention on August 27 of having a ''new crew'' present on Monday, August 30, indicates that on August 27, he foresaw that there would be work to be done, asbestos problem or not.

[9] As earlier described, Mark Culley first testified that ''all of my Union employees told me that they were going to strike.'' Four questions later, he testified that none of the four employees had indicated to him whether or not they would go on strike if one occurred. Shortly thereafter, he testified that the employees had said that it was a ''strong possibility'' that they would ''go on strike.''

[10] Business Manager Waters testified that no decision was made to strike until a membership meeting was held on August 31. Waters said that it was a selective strike, aimed at 5 of the 15 local contractors (other contractors in the unit had special no-strike agreements with the International union); four of the five strike were members of the management negotiating committee. Although Waters ''believed'' that Respondent was a member of the negotiating committee, no thought given to striking Respondent because it ''had no employees.''

[11] That the two employees testified that they would not work in a nonunion setting is irrelevant. As in *Jack Welsh Co.*, supra, 284 NLRB at 383, they were never given ''the opportunity to quit.''

him for a layoff on August 26 because of Respondent's ''financial status'' and said that they had other work ''lined up'' was not directly contradicted.

Counsel for the General Counsel argues that Mark's testimony should be found incredible. She points out that the record shows that, in accordance with the Union's exclusive hiring hall system, James and David would have gone to the bottom of the hiring list after layoff, and that Business Manager Waters testified that ''around August and September of 1992,'' there were ''approximately 100'' names on the list. But, according to Waters, David somehow managed to work, through the Union, ''either 19 or 28 hours . . . for the first week of September,'' and James ''I think 102 hours.''

A couple of weeks after his first job, David took what was ''supposedly a short-term job and it ended up being quite a few months,'' and James, in perhaps the third week of November, was ''called out as a foreman to run a job for a contractor.'' Although the General Counsel seems to believe that this evidence establishes that James and David would not have said that they had other jobs lined up, as Mark claimed, I disagree. For one thing, if there were about 100 people on the hiring hall list as of the end of August (as shown, the testimony is imprecise), it is surprising that David got 19 or 28 hours of work through the Union in the first week of the strike, and James 102 hours (presumably in the whole month of September). Moreover, it is possible that both employees had obtained other, nonunion, jobs in anticipation of the strike, jobs about which Waters was unaware.

Similarly, I find no basis for inferring anything from the fact, as asserted on brief, that Mark ''made no mention of the asbestos problem in his discussion of the reason why James Culley and David Culley were laid off.'' First of all, the statement is inaccurate. Under examination by counsel for the General Counsel about whether Mark would have laid off his two relatives even if they had not asked to be, Mark testified that he would have done so in any event, ''due to the asbestos.'' More importantly, since it was Mark's position that the two had *volunteered* to be laid off, because of Respondent's financial status and their prospective new jobs, it would have been pointless—indeed, inconsistent—for Mark to bring up, either in discussion with them or at the hearing, the problem with the asbestos.

On the other hand, the timing of the departure of James and David, and the fact, as earlier discussed, that their personnel files show that they were ''terminated'' because of ''reduction in force'' rather than having ''voluntarily quit'' in order ''to accept other work,'' inescapably arouse substantial suspicion. The Respondent's witnesses, however, were not asked to explain this discrepancy at the hearing. While, on the one hand, it seems quite likely that James and David did not voluntarily depart, I feel constrained to find as a legal matter that the General Counsel's inferences and arguments are not sufficient to outweigh the uncontroverted testimony of Mark Culley. I recommend dismissal, therefore, of the Section 8(a)(3) allegations pertaining to James and David Culley.

B. *The 8(a)(1) Allegations*

1. The consolidated complaints allege that Respondent, by Mark Culley, violated Section 8(a)(1) by announcing that Respondent ''was going to become a non-union employer.'' The General Counsel relies here on Mark Culley's statement to Jordan on August 27 that the employees were being laid off because Respondent ''just couldn't afford to pay us the Union scale any more and remain Union.'' The General Counsel argues that, at the time, the bargaining agreement was in effect and Respondent was not in a position to legally ''withdraw recognition from the Union and repudiate the collective-bargaining agreement,'' which was to expire in 4 days. The General Counsel cites *Yellowstone Plumbing*, 286 NLRB 993, 1002 (1987), as authority.

In *Yellowstone*, supra, the employer notified the union, almost 4 months prior to expiration of the multiemployer bargaining agreement, that it ''intended to terminate all its agreements with the union'' and no longer considered itself represented by the multiemployer association for bargaining purposes. After the contract expired, the employer withdrew recognition and took unilateral action. The Board held, pursuant to *John Deklawa & Sons*, supra, that Respondent did not violate Section 8(a)(5) because at no time after the expiration of the contract would the union have enjoyed a presumption of majority status. The Board further found that, without violating Section 8(a)(1), the employer ''was free to tell employees that after 1 September 1985, the shop would be nonunion and that wages would not be lowered if the employees went non-union.''

Since Culley's statement was made on Thursday, August 27, the last day of the workweek, and only one possible workday (Monday, August 31) remained before the contract was to expire, Culley's statement to Jordan was arguably identical to the one found by the Board in *Yellowstone*, supra, to be innocent.[12]

Here, however, the General Counsel argues that since Respondent had not withdrawn from the Mechanical Contractors Association and had participated in negotiations for the successor to the contract expiring on August 31, it was ''not in a position to go non-union,'' citing *City Electric*, 288 NLRB 443 (1988). In *City Electric*, supra, the Board held that the respondent was bound to honor a 1980–1981 multiemployer contract, not (explicitly) because of its failure to timely withdraw from the multiemployer unit under the doctrine of *Retail Associates*, 120 NLRB 388 (1958), but because, in 1977, the respondent had signed a self-renewing letter of assent authorizing the contractor's association to bargain for it and had never appropriately withdrawn that assent.

In the present case, the September 1, 1989—August 31, 1992 agreement provided for automatic renewal ''from year to year'' unless ''terminated'' in accordance with the ''Change Or Cancellation'' clause. The latter required that if either party desired ''to change'' (or, by clear implication, terminate) the agreement, it should give written and detailed notice of its desire to do so 120 days in advance of the termination date; after such notice was given, the parties were obligated to ''negotiate in good faith all questions at issue, beginning June 1st and continuing at least weekly prior to the termination date, . . . and all provisions of the Agreement shall remain in effect unless specifically terminated.''

[12] The complaint contains no allegation referring to Mark Culley's statement in early August, in answer to a question by Wilson about what would happen to the employees if Respondent went nonunion, that Culley ''was going to lay them off if he would go non-union,'' as earlier credited. The General Counsel's brief does not mention it as a separate violation. I shall not further consider it.

Thereafter, if no agreement was reached 60 days prior to the expiration date of the current agreement, the dispute was to be submitted to the industrial relations council for the Plumbing and Pipefitting Industry for final settlement, with all current terms to be continued in effect, ''without strike or lockout,'' pending decision by the council.[13]

Despite the clarity of this language, the record shows that the Union, on August 31, voted to strike; a selective strike did in fact occur; and an agreement was eventually reached in December. Whether there were any repercussions from the Union's apparent breach of contract is not disclosed by the evidence.

The Board's leading precedent regarding the principles applicable to the validity of withdrawal of an individual employer from a multiemployer unit is *Retail Associates*, 120 NLRB at 395. Since the Board revised its rules pertaining to 8(f) collective-bargaining relationships in *John Deklewa & Sons*, supra, it has not, to the best of my knowledge, taken a firm position on the application, if any, of *Retail Associates*, supra, to 8(f) cases.[14] Apparently the closest that the Board has come to considering the question was in *Plasterers District Council*, 312 NLRB 1103 fn. 5 (1993), where the panel majority stated:

> As discussed below, the Employer had merely an 8(f) collective-bargaining relationship with the Respondents. We accept arguendo that all of the *Retail Associates* rules apply here to the extent that parties to that relationship did not agree otherwise.[15]

Whether or not the *Retail Associates* strictures apply to 8(f) multiemployer relationships is not necessarily relevant here, however, because, as noted, the Board has held that where 8(f) employers have entered into agreements which make specific provision for automatic renewal of their bargaining agreements unless they comply with express contractual requirements negating such renewal, such 8(f) employers will be bound by those provisions. *City Electric*, supra, 288 NLRB at 444; *Twin City Garage Door Co.*, 297 NLRB 119 fn. 2 (1989); *McDaniel Electric*, 313 NLRB 126 (1993).

The Respondent here did not, in accordance with the contract, give the Union 120 days' advance notification of a desire to terminate their agreement. However, this provision is hardly free from ambiguity. Does it mean that the Respondent can *never* terminate the contract if it fails to give the 120 days' notice; does it waive the failure of notice, and allow unilateral termination, if the weekly good-faith negotiations required by the contract are held; does it allow ''specific [ ] termination'' even in the absence of complying with the earlier steps, or if the Union, contrary to the contract, goes on strike?

In my judgment, the most logical construction of the termination provision is that the contract continues to govern when there has been no compliance with its termination procedure. But such a conclusion carries with it problems galore. If failure to give the 120-day notice keeps the contract ''in effect,'' for how long does the old contract remain in effect? Once the contract has been kept ''in effect,'' how does either party release itself?

There was no litigation of the issues relevant to this subject, and I am unable to arrive at a clear understanding of this provision or its effect in this case. I do believe it is reasonable to hold, however, that the contract must have been subject to termination at *some* time (public policy would insist upon this). As discussed, the Board has specifically held that, in an 8(f) setting, an employer is free to tell employees that that when the contract expires, ''the shop would be nonunion.'' *Yellowstone Plumbing*, supra, 286 NLRB at 994. That is essentially what happened here, and I would not find that Section 8(a)(1) was violated thereby.

2. The consolidated complaint alleges that Respondent violated Section 8(a)(1) when, in or around January 1993, Mark Culley, during telephone conversations, ''interrogated employees concerning their union membership, activities, and sympathies.''

The evidence shows that after the charges were filed, Culley called Wilson and Jordan at home and asked them to withdraw the charges because, according to Jordan, Respondent was having financial difficulties. They both told Culley that such a decision was up to the Union, which had filed the charges. Culley did not deny making the calls, and I credit Wilson and Jordan.

On the face of the evidence, there certainly appears to be no ''interrogation'' as that term is used in labor law parlance. Culley did not inquire into the union activities, sympathies, or sentiments of the two former employees; he simply asked them to do him a favor because of his financial distress. Such a request certainly would not seem reasonably to have had a coercive effect upon Wilson and Jordan, particularly since they were no longer actively employed by Respondent. The General Counsel cites *Quality Engineered Products*, 267 NLRB 593 fn. 3 (1983). The administrative law judge in that case merely recites that shortly after the charge was filed, the employer ''interrogated employees concerning the filing of the charge,'' which may, of course, cloak a multitude of coerciveness. On the facts presented here, I would find no violation.[16]

III. THE 8(A)(5) ALLEGATIONS

Finally, the consolidated complaints allege that Respondent violated Section 8(a)(5) of the Act by, on or about August 27, repudiating the September 1, 1989–August 31, 1992 collective-bargaining agreement, withdrawing recognition from the Union, and ceasing to abide by the terms of the aforesaid bargaining agreement.

While Mark Culley told Business Manager Waters on Friday, August 28, that he was resigning from the Union for ''financial'' reasons, and perhaps Waters might have inferred that the resignation was also a withdrawal of recognition by

[13] Page 16 of the 1989–1992 agreement, which contains a portion of the foregoing provision, was not included in the exhibit forwarded by the official reporter. I inquired of counsel for the General Counsel about the omission, and she promptly, with notification to and consent of other counsel, submitted a copy of the missing page. That page has now been included in Jt. Exh. 2.

[14] Neither the General Counsel nor the Charging Party has addressed this issue on brief.

[15] The majority then went on to find that, under the *Retail Associates* tests, the Employer had effected a timely withdrawal from the multiemployer association and was not bound by a subsequently bargained multiemployer agreement.

[16] I have also examined the cases cited by the Charging Party on this issue. Each of them contains key facts which meaningfully distinguish them from this case.

Respondent from the Union, Waters testified that Culley never told him that he ''was withdrawing from the MCA.'' There is in fact no evidence that Respondent told the Union that it was immediately repudiating the collective-bargaining agreement or withdrawing recognition from the Union, or that it ceased to abide by the agreement, at least as claimed in the complaint, that is, between August 27 and 31.[17] After August 27, there were no employees on Respondent's payroll on the one remaining workday until the official contract term ended on August 31.

The General Counsel asserts that ''by laying off all its union employees and telling its employees that it was going non-union, Respondent repudiated the collective-bargaining agreement on August 27 [footnoting that ''The collective-bargaining agreement was effective through August 31'']. '' In fact, although the first formal phase of the agreement was to end on August 31, its provisions were to remain in effect until the industry council had established new terms. The General Counsel's footnote seems to emphasize the fact that the complaint only addresses the Respondent's conduct vis-a-vis the contract which formally ended on August 31. Neither the complaint nor the General Counsel's brief suggests that the complaint intends to encompass Respondent's behavior beyond August 31, and neither suggests that Respondent violated the Act by failing to abide by any collective-bargaining agreement reached after the one designated in the complaint, i.e., the contract which concluded on August 31, 1992 (see G.C. Exh. 2, pars. 9, 10, 14, and 20). At the hearing, counsel for the General Counsel stated that the complaint encompassed ''just specifically . . . the period of the [1989–1992] contract.''[18]

Since I am unable to find that the Respondent specifically or effectively repudiated the contract or withdrew recognition prior to August 31, or failed to apply the contractual terms prior to that date; and since the complaint and the General Counsel's theory of its cause of action are limited only to the 1989–1992 contract, I need not consider the effect upon the Respondent, if any, of the execution in December of a successor contract effective September 1. On the evidence, pleadings, and arguments presented, I do not find that Respondent violated Section 8(a)(5) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. By, on or about August 27, 1992, terminating James Jordan and Billy Wilson, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Other than as found above, Respondent has not committed unfair labor practices as alleged in the complaint, as amended.

THE REMEDY

The traditional remedies of a cease-and-desist order and posting of notices are appropriate here. In addition, having found that Respondent unlawfully terminated James Jordan and Billy Wilson on August 27, 1992, I shall recommend that it be ordered to offer them immediate and full reinstatement, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings they may have suffered from the date of their termination to the date of Respondent's offers of reinstatement, with interest in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[19] The basis for computing backpay shall be reserved, if necessary, for the compliance stage of this proceeding.

I shall also recommend removal and rescission from Respondent's files of all documentation relating to the terminations of Jordan and Wilson, and notification to them of such action.

On the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended[20]

ORDER

The Respondent, Culley Mechanical and Instrumentation Co., Inc., Ashland, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, or otherwise discriminating against employees and thereby discouraging membership in United Association of Journeymen and Apprentices in the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 10, AFL–CIO (the Union), or any other labor organization.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist the Union or any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If it has not done so, offer to James Jordan and Billy Wilson immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority and other rights

[17] When asked at the hearing whether he had any reason to believe that Respondent has not honored the agreement which retroactively took effect in September 1992, Business Manager Waters said that he did, but then could only explain that he surmised that Respondent was working somewhere and, to his knowledge, was not using union employees.

[18] The complaint goes no further in time than August 1992, referring to the contract which concluded then as ''the most recent'' bargaining agreement. Even though at the hearing on August 7, 1993, a new contract had been consummated since December 1992, and made effective as of September 1, 1992, and at the hearing the complaint was amended in major respects, it continued to refer to the September 1, 1989–August 31, 1992 contract as the ''most recent'' one.

[19] See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and privileges, and make them whole in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the terminations of James Jordan and Billy Wilson, and notify them in writing that this has been done and that their discharges will not used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Ashland, Virginia, copies of the attached notice marked ''Appendix.''[21] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that those portions of the complaint found to be without merit are dismissed.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''